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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

HAZELWOOD SCHOOL DISTRICT, et al., *Petitioners,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States, John F. Kennedy, to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, nine past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the

nation's leading lawyers. Through its national office in Washington, D.C. and its offices in Jackson, Mississippi and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee and its staff have a long history of support for, and participation in, school desegregation litigation. For example, the Committee filed a brief and participated in oral argument as *amicus curiae* in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969). Volunteer attorneys, under the auspices of the Lawyers' Committee, have assisted plaintiffs' counsel in numerous proceedings which resulted from this Court's decision in *Alexander. See, e.g., Gordon* v. *Jefferson Davis Parish School Board,* 446 F.2d 266 (5th Cir. 1971). More recently, staff and volunteer attorneys of the Lawyers' Committee have assisted in representing plaintiffs in such cases as *Morgan* v. *Kerrigan,* 509 F.2d 580 (1st Cir. 1974) *cert. denied,* 421 U.S. 963 (1975); *Brinkman* v. *Gilligan,* 518 F.2d 853 (6th Cir. 1975), *cert. denied,* 423 U.S. 1000 (1975) and *Dayton Board of Education* v. *Brinkman,* 539 F.2d 1084 (6th Cir. 1976) *cert. granted,* 50 L. Ed.2d 775 (1977). The Lawyers' Committee has also been directly involved in *Milliken* v. *Bradley,* 540 F.2d 229 (6th Cir. 1976) *cert. granted,* 97 S. Ct. 380 (1977) and *Pasadena City Board of Education* v. *Spangler,* 96 S. Ct. 2697 (1977).

Since 1971, the Lawyers' Committee through a grant from the Equal Employment Opportunity Commis-

sion has assisted the private bar in litigation under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) on behalf of hundreds of injured individuals and class members. The Lawyers' Committee, through its Government Employment Project, its local committees, affiliates and volunteer lawyers is also actively engaged in providing legal representation to the victims of racially discriminatory employment practices of federal, State and local governments. *See, e.g., Chandler* v. *Roudebush,* 96 S.Ct. 1949 (1976); *Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir.), *cert. denied,* 419 U.S. 895 (1974); *Douglas* v. *Hampton,* 512 F.2d 976 (D.C. Cir. 1975).

In view of our continuing heavy involvement in school desegregation and Title VII cases, it is obvious that the issues which the petitioners seek to raise in their appeal in the instant case are of particular importance to the Lawyers' Committee. Should the Court hold, as petitioners contend, that it lies beyond the power of Congress to extend Title VII to State and local governments under the Enforcement Clause of the Fourteenth Amendment, a devastating blow would be dealt to the efforts being made to eradicate the effects of segregation in our nation's schools, including their faculties.

The interest of the *amicus curiae,* therefore, stems from our longstanding efforts to secure to black citizens their right under the Fourteenth Amendment to be free from discrimination based on race in all aspects of our national life.

The written consent of the parties, pursuant to Supreme Court Rule 42(2), is filed herewith.

STATEMENT OF THE CASE

This suit was filed by the Attorney General in the name of the United States on August 9, 1973, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.* (1970), *as amended,* 42 U.S.C. Sec. 2000e *et seq.* (Supp. II, 1972), and the Fourteenth Amendment to the federal constitution, alleging that the Hazelwood School District, located in St. Louis County, Missouri, was practicing racial discrimination in hiring teachers and staff. Specifically, the government charged that, in hiring teachers, Hazelwood was pursuing a pattern or practice of racial discrimination that had its antecedents in *de jure* segregation that existed prior to 1955. The government contended that, long after the legal barriers had been struck down, Hazelwood persisted in refusing to employ black teachers who were as well or better qualified than white applicants who were hired instead. Injunctive relief was sought to put an end to discriminatory hiring practices and to require the district to recruit black faculty and staff, and further relief was sought to obtain back pay for the victims of past discrimination.

The Hazelwood School District occupies 78 square miles of territory and serves 25,000 students, mostly white, in five communities in northern St. Louis County. It is partially contiguous with the St. Louis City School District. The Hazelwood School District was created between 1949 and 1951 by consolidating thirteen rural school districts. Before 1955, Hazelwood employed no black faculty or staff. This reflected the fact that under state law the schools were segregated by race with respect to both faculty and students. Since the Hazelwood District did not have a resident black

population at that time, there was no black school and, consequently, no black faculty.

Hazelwood did not hire a black faculty member until 1969, although a 1964 policy adopted by the District proclaimed that teachers would be hired "on the basis of training, preparation and recommendations regardless of race, color or creed." In 1970-71, the number of black teachers had risen to six, constituting 0.6 per cent of the total teachers in the District. In 1972-73, 13 of 1,197 teachers, or 1.1 per cent, were black, and in 1973-74, Hazelwood employed 22 black teachers out of 1,231, or 1.8 per cent. In contrast, in 1970, over 15 per cent of the teachers in St. Louis City and County were black.

The low percentage of black teachers employed by Hazelwood reflected hiring practices which had long been biased in favor of whites. Although there were two predominantly black colleges in Missouri, Harris Teachers College and Lincoln University, Hazelwood did not recruit from them but instead sought to attract graduates from predominantly white colleges and universities in Missouri, Illinois, Arkansas, Kansas and Oklahoma. Hazelwood did not recruit from black colleges in other states. As late as the 1962-63 school year, some teacher application forms still had a space for "race" and in 1962 Hazelwood placed an advertisement in a Jackson, Mississippi newspaper for elementary and kindergarten teachers, limiting applicants to "white only."

The procedures for hiring faculty members are totally deficient in objective standards, thus enhancing the opportunity for racially based decisions to be made. Applications are kept on file at the central personnel

office. Applicants are instructed to update their forms annually, and applications not kept current are discarded. When vacancies occur, the personnel office notifies applicants selected from the file and advises them to arrange an interview with the appropriate principal.

The hiring procedure is in three steps: first, the applicants meet as a group with Hazelwood's elementary or secondary school coordinator, who familiarizes them with the district. Next, each applicant is interviewed by the principal. Thirdly, the principal makes a recommendation to the coordinator, who makes a recommendation to the Superintendent. Ordinarily, the principal's choice is followed. All of the elementary and secondary principals are white. There are no standards to govern the principal's choice except a general instruction to hire "the most competent person."

Evidence was presented concerning 55 black teachers who had unsuccessfully sought positions at Hazelwood, and 25 of them testified at trial. This testimony established that black applicants were advised frequently that there were no vacancies in their field, after which white applicants for the same position were hired. *United States* v. *Hazelwood School District,* 534 F.2d 805, 814-15 (8th Cir. 1976). While Hazelwood had a policy of giving preference to teachers who had previously taught in the system, this policy was not followed with respect to some black applicants. Black applicants were denied employment on the ground that they lacked certification, even though it was common practice in the District to hire recent graduates on the understanding that they would obtain certification. 534 F.2d at 809 n.2. Often, black applicants were not given any interviews at all, although an interview

was a necessary predicate to employment. 534 F.2d at 809 n.3.

The district court held that the government had failed to establish a "pattern and practice" of discriminatory hiring practices under Title VII or the Fourteenth Amendment. The court held that the percentage of black teachers was roughly comparable with the percentage of black students in the Hazelwood District. The court also held that the record did not support claims by 55 unsuccessful black applicants for teaching positions that they had been discriminated against on the basis of their race. *United States* v. *Hazelwood School District,* 392 F. Supp. 1276 (E.D. Mo., 1975).

The Court of Appeals reversed, one judge dissenting. *United States* v. *Hazelwood School District,* 534 F.2d 805 (8th Cir. 1976). The majority found that the trial court had erred in failing to assign appropriate weight to the evidence adduced by the government concerning Hazelwood's prior hiring practices which was "highly relevant to show that present policies or practices which appear neutral on their face, perpetuate past discriminatory policies." *Id.* at 811. The Court also held that the district court erroneously compared the percentage of black teachers in Hazelwood with the percentage of black students in the schools rather than with the percentage of black teachers in the relevant labor market—St. Louis City and County.

The combination of the statistical evidence, the hiring practices which gave almost total discretion to the 23 school principals (all of whom were white), the past pattern of employment discrimination, and the Court's finding that 16 black applicants had been de-

nied employment based on race, led the Court to conclude that the government had established a *prima facie* case of a pattern or practice of employment discrimination in violation of Title VII which had not been adequately rebutted by the State.

In a separate discussion, headed "III" in its opinion, the Court of Appeals examined the record concerning claims of discrimination by specific individuals and concluded on the basis of the individual facts of each case that the government "proved unlawful discrimination against 16 rejected black applicants." 534 F.2d at 819.

The Court of Appeals instructed the district court on remand to enter an order enjoining Hazelwood (1) from discriminating against any applicant for a teaching position on the basis of his race or color; (2) to promulgate accurate job descriptions and hiring criteria to ensure that all applicants are judged on the basis of individual merit; (3) to announce its hiring procedures in application and recruiting materials; (4) to ensure that notice of all available openings be given to all potential applicants, that black colleges be included in any future recruitment activities, and that black college students be given the opportunity to student teach at Hazelwood; (5) to maintain records to facilitate government inspections as well as to prepare periodic reports for the Justice Department for a three year period; and, (6) to give the sixteen applicants found by the Court to have been discriminated against, preferential standing and the right of first refusal of any vacancies to which their qualifications would entitle them. The Court also ordered back pay awards for two applicants and directed the district court to determine whether back pay should not be awarded to fourteen others.

SUMMARY OF ARGUMENT

I.

It is unnecessary to address the constitutional argument which the petitioners seek to raise because the record is replete with evidence of purposeful discrimination. Through misrepresentation, selective applications of its own hiring policies, and utilization of a system that gave maximum leeway for preferential hiring, Hazelwood ensured that qualified black applicants would not be employed. Petitioners' claim that the Court of Appeals' ruling that 16 specific individuals were discriminated against was predicated on the court's finding of a pattern of discrimination is simply a misreading of the Eighth Circuit's opinion. The Court reached its conclusion concerning these individuals on its examination of the facts in each individual case and nothing else. Nor does petitioners' claim that applicant-flow statistics demonstrate that the 16 individuals could not have been the subjects of discrimination withstand analysis. The record does not establish race-identification of applicants for the years in question. In any event, failure to discriminate against *some* blacks is not a conclusive defense to a claim of discrimination against other blacks, and the petitioners did not offer any rebuttal evidence concerning the individuals in question. 534 F.2d at 814.

II.

Assuming the court reaches the constitutional question, it is a valid exercise of Congressional power under the Enforcement Clause of the Fourteenth Amendment to make Title VII's prohibition of practices which have a disproportionately adverse racial

impact, even if not purposeful, applicable to State and local governments. This result is commanded by this court's decisions in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). The legislation is adapted to carry out the objects of the Fourteenth Amendment and tends to enforce compliance with the prohibitions they contain. The extension of Title VII to State and local governments is designed precisely to achieve this result. The legislative history of the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103, contains an adequate factual basis for Congress' action in expanding the reach of Title VII.

ARGUMENT

I. HAZELWOOD'S CONSTITUTIONAL ARGUMENT SHOULD NOT BE REACHED BECAUSE THERE IS SUBSTANTIAL EVIDENCE OF PURPOSEFUL RACIAL DISCRIMINATION IN ITS TEACHER HIRING PRACTICES

The record substantiates the Court of Appeals' finding that Hazelwood has engaged in purposeful discrimination in the selection of black applicants to interview, and in the selection of black interviewees to hire. For example, the school district had admittedly engaged in extensive recruiting efforts at predominantly-white colleges, but had refused to do so at predominantly-black colleges. The testimony of the man who served as its Superintendent of Schools from July 1953 through June 1967 is instructive:

Q. Did you ever recruit at Lincoln University?

A. I never did recruit at Lincoln University.

Q. For what reason?

A. In the early years of my superintendency that was a Negro university.

App. 54-55.[1]

The Court of Appeals also discussed instance after specific instance in which the Hazelwood school district treated black applicants for teaching positions in a manner both different from, and less favorable than, the manner in which it treated white applicants. In some instances Hazelwood used inconsistent standards, as when it disqualified blacks for "reasons" which were equally applicable to whites, but which did not result in whites being barred from employment. In other instances, the school district's unfavorable treatment of black applicants violated its own policies. In still others, the school district's favorable treatment of whites resulted in a waiver of some of the few objective criteria it claims to have recognized. In none of these types of instances did the school district offer any explanation for its different treatment of black and white applicants; in none did it produce any evidence that might prove a lack of purposeful racial discrimination, such as evidence that some white applicants were disqualified for reasons which did not bar the employment of blacks, or evidence that Hazelwood violated its own policies in any assertedly unfavorable treatment of any white applicant, or evidence that it ever waived any of its objective criteria in favor of any black applicant.

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[1] In its brief at 11, the school district makes much of a single visit of a subordinate official to Lincoln University thirteen or fourteen years ago, but the school district's claim that black students were uninterested in it is somewhat thin; its "recruiter" failed to speak to a single black student. 534 F.2d at 811 Note 6.

The Court of Appeals pointed out that Hazelwood misrepresented to Derek Novel, a black, that there were no vacancies in the type of teaching position for which he had applied, that it then hired ten later-applying applicants for the assertedly nonexistent vacancies in that type of position, that five of the persons so hired had qualifications inferior in whole or in part to Novel's, that one of the successful applicants "had even been dismissed from his university on the basis of his grades," and that Hazelwood offered no explanation of these facts. 534 F.2d at 814-15. The school district has not challenged, or even mentioned, this statement by the Court of Appeals in its brief before this Court.

Also, the Court of Appeals pointed out that Hazelwood had a policy of giving preference to applicants who had successfully done their student teaching in that district,[2] but did not apply this policy to Robert Howell, a black applicant. The Court of Appeals pointed out that Hazelwood had not even bothered to interview Howell, that subsequent to his application it had hired ten whites for the type of teaching position for which he had applied, that nine of the ten successful white applicants had no more experience than Howell, and that Hazelwood offered no explanation of these facts. 534 F.2d at 815. The school district's only rejoinder to this Court is its assertion, in its brief at 69, that there were only nine successful white applicants and that the remaining one person was black.

In addition, the Court of Appeals pointed out that Alice Roach, a black teaching applicant, had assertedly been disqualified because she lacked teaching certification at the time she applied, but that Hazelwood had routinely hired white applicants who lacked teaching certifications at the time of their applications. 534 F.2d at 815. Indeed, plaintiff's exhibit 61 listed 101 Hazelwood teachers who lacked certifications at the time of their applications, and shows that over half of them did not have teaching certificates even at the time Hazelwood made its job offers to them. App. 429-31. The Court of Appeals noted that Hazelwood had offered no explanation for the application of a different standard to Alice Roach, 534 F.2d at 815-16, and the district remains silent in its brief before this Court.

[2] 534 F.2d at 815. The district court had also found this to be Hazelwood's policy. 392 F.Supp. at 1281.

The above situations were not unique; the Court of Appeals pointed out that Hazelwood has misrepresented to several black applicants the nonexistence of openings which in fact did exist, in addition to the "several" misrepresentations it made to Derek Novel, 534 F.2d at 815; such misrepresentations were made to James Washington, 534 F.2d at 815, to Samuel Downs, *Id.*, and to Cynthia Edmond, 534 F.2d at 816. Only as to Cynthia Edmond does the school district now deny misrepresentation, in its brief at 69, and even that denial is based on an interpretation of her trial testimony which is not the only possible interpretation. The Court of Appeals similarly pointed out the school district's pretextual reliance on the lack of teaching certificates at the time of application for several black applicants, despite Hazelwood's waiver of such requirements for whites; besides Alice Roach, the petitioner relied on this pretext as to Delores Penten, 534 F.2d at 816, Georgia Shaw, 534 F.2d at 816-17, Alexis Smith, 534 F.2d at 817, Geraldine Thomas, *Id.*, Mary Wilson, *Id.*, and Robert Wilson, 534 F.2d at 818. Moreover, as the Court of Appeals observed, the school district violated its own

policy of giving preference to applicants who had successfully done their student teaching in the Hazelwood district in the case of Georgia Shaw, *Id.*, as well as that of Robert Howell. 534 F.2d at 815.

The school district asserts, in its brief at 72, that none of the above disputed facts matters because *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973) requires a showing that the applicant is "qualified," that only a personal meeting with a Hazelwood principal can determine whether an applicant is "qualified," and that the applicant's "self-serving recitations as set forth in their written applications" are insufficient to show that they were "qualified." The assertion is untenable; if it were otherwise, a school district could refuse to hire a single black and could escape liability by the simple expedient of refusing to give blacks the opportunity for an interview.

The school district also argues, in its brief at 62, that the undisputed facts discussed by the Court of Appeals are in some unexplained way "tainted" by a "prior error-infected finding of a pattern or practice of discrimination." In point of fact, the Court of Appeals never once relied on its findings of such a pattern in discussing the undisputed evidence of discrimination against sixteen black applicants. Indeed, the Court of Appeals may have erred in *failing* to use the finding of a pattern to shift the burden to Hazelwood with respect to the thirty-nine black applicants the Court of Appeals held not to have been discriminatd against, cf. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 772-73 (1976). In any event, a plain reading of the Court's decision establishes that its evaluation of the treatment the sixteen received was entirely independent of its other findings of discrimination.

Finally, Hazelwood relies on applicant-flow statistics to support its contention that, notwithstanding its disparate treatment of the sixteen black applicants discussed by the Court of Appeals, blacks as a whole fared better than whites and that this somehow disproves discrimination as to the sixteen. Brief for petitioners at 61-62. This argument has no factual basis in the record. Hazelwood's contention is based on the assumption that most of the black applicants have been race-identified, but the record is completely silent as to the number of applicants in the years in question who actually were race-identified. Moreover, the record does contain two indications that there were substantial numbers of persons whose race could not be identified. First, Hazelwood's applicant-flow contention is based on data for the total number of applicants for the 1971-72 and 1972-73 school years, brief at 8, 47-48, even though race-identification was impossible for the great bulk of the 3,127 applicants for the 1971-72 school year. The school district routinely destroyed most old applications and the district court stated that "the years for which the district had retained personnel records" were for the 1972-73 and 1973-74 school years. 392 F. Supp. at 1281.[3] Second, it is obvious from the means of race-identification used by the Government [4] that, even where application forms had been preserved, many blacks would not have

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[3] Hazelwood admits that most of the persons who were race-identified as black had applied in the years for which records were preserved. Brief at 8.

[4] The Government tried to race-identify applicants as black by determining whether they had attended local, predominantly-black schools, or had attended predominantly-black colleges and universities, or from optional photographs some persons had included with their applications. Tr. 306-07.

been race-identified. It is probable that some blacks in the local area had not attended predominantly-black schools. Furthermore, this means of racial identification was not even used for non-local applicants and plaintiff's exhibit 2 shows that roughly one third of Hazelwood's applicants were not local. The next means of racial identification, relying on attendance at predominantly-black colleges and universities, would have failed to identify the race of blacks who did not attend such schools. According to the Institute for the Study of Educational Policy at Howard University, only 23 percent of black college students in the Fall of 1973 were enrolled in predominantly-black colleges and universities. Institute, *Equal Educational Opportunity for Blacks in U.S. Higher Education: An Assessment* (1976) at p. 56. The conclusion is inescapable that this means of race identification would have failed to work on three-quarters of the black applicants. The next means of racial identification, reliance on photographs, was insufficient because the school district had not required photographs since 1954, 392 F. Supp. at 1280. Finally, the school district's applicant-flow contention is weakened by its reliance on hiring data for the period of time after it learned that the Government was contemplating suit against it.

There is a legal, as well as a factual, defect in Hazelwood's effort to rebut the individual showings of discrimination by reliance on applicant-flow data. An employer's failure to discriminate against *some* blacks is, while relevant, not a conclusive defense to a claim of discrimination against *other* blacks. "A single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable deci-

sions." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, —— U.S. ——, 50 L.Ed. 2d 450, 465 note 14 (1977). In case after case, the Courts of Appeal have held that the right to freedom from employment discrimination is personal to each victim of such discrimination, and that fair treatment of other blacks, even the hiring of blacks in proportion to their number in the applicant flow or in the local population or work force, is not dispositive of the claim of the person actually discriminated against. *Franklin* v. *Troxel Mfg. Co.*, 501 F.2d 1013, 1016 (6th Cir., 1974); *Mims* v. *Wilson*, 514 F.2d 106, 109 note 5 (5th Cir, 1975); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 275 note 18 (4th Cir.), *cert. den.*, —— U.S. ——, 50 L.Ed.2d 286 (1976).

While it is important to note that each of the sixteen instances of individual discrimination cited by the Court of Appeals meets the *McDonnell Douglas* standards for shifting to the employer the burden of proving nonracial motivation for the disparate treatment of black applicants, it is equally important to note that the undisputed evidence of record as to these sixteen also meets the *Arlington Heights* standards for inferring discriminatory motivation in the absence of an admitted discriminatory intent. These sixteen instances involve "[d]epartures from the normal procedural sequence", include showings that "the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached", 50 L.Ed. 2d at 466, and involve a series of questionable actions rather than a few facts taken in isolation, cf. 50 L.Ed. 2d at 465. The school district's haphazard and subjective decisionmaking is more readily analogous to jury selection than it is to governmental decision making,

e.g., on the adoption of an employment test or on the acceptance or location of public housing. Thus, discriminatory purpose may be inferred more readily in the case at bar than in cases such as *Washington* v. *Davis,* 426 U.S. 229 (1976) or *Arlington Heights.* This Court so recognized in *Washington,* 426 U.S. at 244-245, and in *Arlington Heights,* 50 L.Ed.2d at 465 note 13.[5]

Notwithstanding the school district's protestations, brief at 22, it is always open to a public or private employer to prove a nonracial motivation for the actions under challenge. There may be nonracial reasons, for example, which explain why a school district would refuse to abide by its policy to interview an applicant who had successfully done his or her student teaching in that district. Nevertheless, a court of law cannot decide such a case on the basis of speculation. If there were a nonracial explanation in any of these sixteen instances, the burden of persuasion was with the school district. And Hazelwood did not even try to make such showings. Instead, throughout this litigation it has acted as if the Government had the threshold burden of proving specific racial motivation for the actions of the district's officials. Perhaps the clearest indica-

[5] *Cf. Newman* v. *Henderson,* 539 F.2d 502, 505 (5th Cir., 1976), a Fourteenth Amendment jury case in which the court interpreted this passage in *Washington* as distinguishing between a governmental selection process such as a test, which separates the qualified from the unqualified and in which proof of discriminatory purpose is required to show that the process distinguishes on the basis of race rather than on the basis of nonqualification, and a governmental selection process which merely picks some individuals from among a group of qualified persons. Where there is no competing inference of nonqualification, *Newman* held proof of discriminatory impact is tantamount to proof of discriminatory purpose.

tion of this flaw in Hazelwood's approach lies in its discussion of its failure to interview or to hire a strikingly well-qualified applicant, Georgia Shaw:

> The latter case, that of Miss Shaw, may be puzzling on the face of things—*one wishes that she had testified*—but it is not without more the basis for a finding of discriminaton.

Brief for petitioners at 71 (emphasis supplied). It is factually clear, however, that only Hazelwood can explain its reasons for its rejection of her for even an interview, and it is legally clear that Hazelwood's decision to stand mute on this claim, as on the others, itself supports the inference that both she and the others were deliberately rejected on racial grounds. This evidentiary principle is both old and basic. Over two hundred and seventy years ago, the Court of Queen's Bench articulated it:

> . . . [B]ut if very slender evidence be given against him, then, if he will not produce his books, it brings a great slur upon his cause.

Ward v. *Apprice,* 6 Mod. 264, 87 Eng.Rep. 1011 (Q.B., 1705). Professor Wigmore has stated that the failure or refusal to produce a relevant document "is evidence from which alone its contents may be inferred to be unfavorable to the possessor. . . ." 2 J. Wigmore, *A Treatise on the Anglo-American System of Evidence,* § 291 at p. 187 (3rd Ed., 1940). *See also* 2 Conrad, *Modern Trial Evidence,* § 960 at p. 169 (1956). This Court noted in *Interstate Circuit Inc.* v. *United States,* 306 U.S. 208, 221 (1939), that it is usual, in cases of alleged unlawful agreements to restrain commerce, that "the government is without the aid of direct testimony that the distributors entered into any agreement", and that to

establish agreement "it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators." Following the same principle laid down over two hundred years earlier in *Ward* v. *Apprice*, this Court then held that the antitrust defendants' failure to call knowledgeable witnesses:

> . . . is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character.

As a general proposition, Hazelwood's assertion in its brief that teacher selection involves an element of discretion which will inevitably reflect the application of subjective criteria, states a reality with which few would probably quarrel. However, the rubric of "subjective criteria" cannot be used to mask racially discriminatory hiring practices. In the context of teaching, differences in philosophy might be a valid criterion for hiring an applicant. Skin color is not. Hazelwood has totally failed to provide an adequate nonracial explanation for its disparate treatment of its black and white applicants.[6]

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[6] A few limited examples from the record will suffice to demonstrate Hazelwood's casual treatment of this crucial issue. Hazelwood's Coordinator of Secondary Education testified:

> Q. Well, are there subjective standards also?
> A. No, our intangibles are personal.
> Q. What would they be?
> A. My gosh. You could list many. I mentioned some, voice articulation, attitude that the person might detect towards kids, towards teaching. You could just go on and on, and say that I might see or you might see some things different from me, and you and I are sitting across the table from each other, and you shake hands with each other. You can begin to evaluate things the way you grab a man's hand, tells me something, and from that point on I begin to look at you from a personal point of view.

App. 50-51. The Superintendent of the Hazelwood district testified:

> Q. Has Hazelwood ever conducted any analysis of the various teaching jobs to see what qualifications should be required for each one?
> A. No.
> Q. Has Hazelwood ever conducted any studies to make sure that its practices, procedures and standards result in the employment of the best qualified teachers?
> A. We have no standards, but we have not conducted any studies along this line.

App. 61. The result of this abdication of the school district's responsibilities is predictable: each hiring official does whatever he wants, free of any realistic constraint against making improper —or racially biased—decisions. The Court of Appeals singled out compelling testimony by a principal as to the scope of his discretion: it "was like dating a girl, some of them impress you, some of them don't." 534 F.2d at 812. Another testified:

> Q. Have they explained to you what is meant by best qualified?
> A. It's a feeling that a principal has, when he has been in charge of a building, we don't have a barometer to set someone up by.

App. 65.

The relief ordered by the Court of Appeals is carefully tailored and amply justified by the school district's purposeful discrimination in interviewing and in hiring black teachers, and in limiting its past recruitment efforts to whites. The Court of Appeals did not abolish Hazelwood's use of subjective criteria, but merely required that the subjective standards it desires to use be made publicly known and be fairly applied. The Court of Appeals did not require any recruiting, but merely required that there be no discrimination in whatever recruiting Hazelwood decides to do. No aspect of relief is dependent on any showing of unintentional discrimination. There is therefore no occasion for this Court to reach the constitutional question.

II. IN THE EVENT THAT THE CONSTITUTIONAL QUESTION IS REACHED, THE EXTENSION TO STATE AND LOCAL GOVERNMENTS OF TITLE VII'S PROHIBITION OF PRACTICES WHICH HAVE A DISPROPORTIONATELY ADVERSE RACIAL IMPACT BUT WHICH ARE NOT THE RESULT OF A DISCRIMINATORY PURPOSE IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE ENFORCEMENT CLAUSE OF THE FOURTEENTH AMENDMENT.

The distinguishing feature of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, is its prohibition of practices which have a disproportionately adverse impact on a group and which are not justified by business necessity, regardless of the presence or absence of discriminatory purpose. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *Washington* v. *Davis, supra,* 426 U.S. at 246-7; *General Electric Co.* v. *Gilbert,* —— U.S. ——, 50 L.Ed.2d 343, 354-55 (1976).

The question Hazelwood seeks to have this Court decide is whether the Enforcement Clause of the Fourteenth Amendment[7] authorized Congress to accomplish the Amendment's purpose of ending racial discrimination by States through a means which proscribes some actions additional to those directly proscribed by the Amendment itself. *Amicus* urges that the answer is in the affirmative.

The scope of the powers granted by the Enforcement Clauses of the Civil War Amendments is well illustrated by reference to the legality of literacy tests for voter registration. In *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45, 51-53 (1959), this Court held

[7] Section 5 of the Amendment states:

> 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

unanimously that, absent proof of discriminatory purpose or of discriminatory administration, North Carolina's literacy test for voting did not violate the Fourteenth or Fifteenth Amendments:

> Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. . . . We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.
>
> Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. In *Davis* v. *Schnell,* 81 F.Supp. 872, *aff'd* 336 U.S. 933, 93 L.Ed. 1093, 69 S.Ct. 749, the test was the citizen's ability to "understand and explain" an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter "be able to read and write any section of the Constitution of North Carolina in the English language." That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.

Then the Voting Rights Act of 1965 was passed, and Congress suspended *all* literacy tests in the areas covered by the Act, based upon evidence of discriminatory purpose or discriminatory administration in *some* areas. § 4(a) of the Act, 79 Stat. 438. When this provision was challenged, this Court held that an across-the-board suspension, even without prior adjudication of a particular test's invalidity because of discriminatory purpose or discriminatory administration, was appropriate legislation to "enforce" the Fifteenth Amendment. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 333-34, 337 (1966).

The ban on literacy tests was extended nationwide by § 201 of the Voting Rights Act Amendments of 1970, 84 Stat. 315, 42 U.S.C. § 1973aa. Under this amendment, no State or political subdivision of a State could escape the ban by showing that it had never discriminated in voting, and that it had never used any "test or device" in a discriminatory manner or with a discriminatory purpose. Despite the legality of such literacy tests under the Fourteenth and Fifteenth Amendments in areas, such as Arizona, which had never discriminated or tried to discriminate, this Court unanimously upheld the new right declared by Congress under the Enforcement Clause of these Amendments. *Oregon* v. *Mitchell,* 400 U.S. 112, 118 (1970).

The impact of the Enforcement Clause power upon the scope of the Fourteenth and Fifteenth Amendments rights is clear. In an area which the Court had refused to enter because of the limitations on its power to define violations of the Civil War Amendments, the Enforcement Clause gave Congress the power both to define new rights and to provide new means of effectuating old rights, in order to protect the underlying constitutionally declared right to freedom from discriminatory obstacles to voting. Similarly, it is clear that not every new voting procedure in a State which had formerly discriminated in voting would contravene the Fourteenth and Fifteenth Amendments, but this Court has held that Congress had the power under the Enforcement Clauses to suspend such new procedures and to make them unlawful unless the State carries the burden of showing that the changes will have *neither* the purpose *nor the effect* of discrimination in voting. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 334-35.

From the beginning, the Enforcement Clauses of the Civil War Amendments have been held to invest Congress, the branch of government expressly entrusted with their enforcement, with the authority both to create new rights serving the general purposes of the Amendments, and to create new remedies to effectuate those rights. To enforce the prohibition of "involuntary servitude" in the Thirteenth Amendment, Congress had the power to enact the anti-peonage statute, 14 Stat. 546, 18 U.S.C. § 1581, which extended the definition of Thirteenth Amendment rights to include compulsory service to secure the payment of a debt, and extended the remedy for their violation by providing criminal sanctions. *Clyatt* v. *United States,* 197 U.S. 207, 218 (1905). To enforce the prohibitions of the Fourteenth Amendment, Congress had the power to enact § 4 of the Civil Rights Act of 1875, 18 Stat. 336, 18 U.S.C. § 243, which extended the definition of Fourteenth Amendment rights to include the right to freedom from racial discrimination in service on grand juries and trial juries, and provided the remedy of

criminal sanctions, and the remedy of removal, for such violations. *Ex parte Virginia,* 100 U.S. 339 (1880); *Strauder* v. *West Virginia,* 100 U.S. 303 (1880). This Court had not itself defined the scope of Thirteenth and Fourteenth Amendment rights to include such matters at the time Congress enacted these provisions, and it could certainly never have provided the remedies discussed above.

Congress, therefore, clearly has the power under the Enforcement Clause to define rights under the Fourteenth Amendment which go beyond those independently guaranteed by the Amendment; it clearly has the power to alter and shift the burden of proof required to establish a violation of the rights secured by the Amendment; and, it has the power to create new remedies, of a kind different from that which the courts themselves could create for their violation.[8]

[8] Hazelwood contends that a rule giving Congress the authority "to give substantive, as opposed to remedial implementation" to Fourteenth Amendment rights, *cf. United States* v. *Guest,* 383 U.S. 745, 754-55 (1966), may also have the undesirable effect of allowing Congress to restrict existing judicially-declared rights under the Amendment. Brief at 31, 35.

Unlike the congressional power to "regulate" interstate commerce which includes the power to grant or withhold protection of such commerce, *State Bd. of Insurance* v. *Todd Shipyards Corp.,* 370 U.S. 451, 456-57 (1962), the congressional power under the Civil War Amendments is only "to enforce" them. *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 note 10 (1966); *Oregon* v. *Mitchell, supra,* 400 U.S. at 249 note 31 (Brennan, J. joined by White, J., and Marshall, J.), 400 U.S. at 287 (Stewart, J., joined by Burger, C.J., and Blackmun, J.) and 400 U.S. at 128-29 (Black, J.). This Court previously addressed the same question with respect to the Eighteenth Amendment, and held that the concurrent power of Congress and of the States to enforce that provision does not enable them "to defeat or thwart the prohibition, but only to enforce it by appropriate means." *Rhode Island* v. *Palmer,* 253 U.S. 350, 387 (1920). *Accord, McCormick & Co., Inc.* v. *Brown,* 286 U.S. 131, 143-44 (1932).

The only remaining question is whether the particular Congressional action in question is appropriate under the Fourteenth Amendment. In essence, does the legislation conflict with an express prohibition in the Constitution, is the legislation "adapted to carry out the objects the amendments have in view", and does it "tend[s] to enforce submission to the prohibitions they contain." *Ex parte Virginia, supra,* 100 U.S. at 345-46. *Accord, McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 315, 421 (1819); *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 326; *Katzenbach* v. *Morgan, supra,* 384 U.S. at 650; *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 443 (1968). *Cf. James Everard's Breweries* v. *Day,* 265 U.S. 545, 559 (1924).

The holding of *Washington* v. *Davis* that purposeful discrimination is a required element of a Fourteenth Amendment violation did not purport to create a constitutional right in a State to freedom from all judicial inquiry as to its employment practices in the absence of such a showing. It merely stated a limit to judicial enforcement of the Amendment in the absence of action by the branch of government the Amendment had designated as primarily responsible for its enforcement. *Compare Lassiter, supra,* and *South Carolina* v. *Katzenbach, supra.*

On its face, the extension of Title VII to State and local governments is adapted to carry out the objects of the Fourteenth Amendment and to enforce submission to its prohibition against discrimination. In evaluating the propriety of the "inventive manner" in which Congress exercised its authority to end purposeful discrimination in voting by broadly prohibiting practices shown to have had a disparate racial impact

in some particular situations, this Court held that such legislative action was permissible where Congress had a sufficient factual basis for deciding that there was a problem of sufficient scope to warrant its intervention. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 327, 329-31. *Accord, Katzenbach* v. *Morgan, supra,* 384 U.S. at 654-56; *Oregon* v. *Mitchell, supra,* 400 U.S. at 132-33 (Black, J.). In *South Carolina* v. *Katzenbach,* this Court held that "Congress . . . may avail itself of information from any probative source", and held that studies of the U.S. Commission on Civil Rights were such a probative source. 383 U.S. at 330.

The legislative history of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, clearly shows a sufficient factual basis for the extension of Title VII to local and State governments. The U.S. Commission on Civil Rights had issued a report in 1969, ***For All the People . . . By All the People: A Report on Equal Opportunity in State and Local Government Employment***, which found extensive employment discrimination by state and local governments, both of the purposeful type exemplified by the case at bar and of the type involving objective, facially neutral requirements adopted in good faith but having a disproportionately adverse effect on blacks,[9] and concluded by

[9] The Commission's findings stated in part:

BARRIERS TO EQUAL OPPORTUNITY

4. State and local government employment opportunities for minorities are restricted by overt discrimination in personnel actions and hiring decisions, a lack of positive action by governments to redress the consequences of past discrimination, and discriminatory and biased treatment on the job.

(a) A merit system of public personnel administration does not eliminate discrimination against members of minorities. It proclaims objectivity, but does not assure it. Discrimination occurs both in recruiting and in selection among final applicants.

(b) Governments have undertaken few efforts to eliminate recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities. Further, governments have failed to undertake programs of positive action to recruit minority applicants and to help them overcome barriers created by current selection procedures.

(c) Promotional opportunities are not made available to minorities on an equal basis by governments that rely on criteria unrelated to job performance and on discriminatory supervisory ratings.

For All the People at 119. Its Conclusion made the same point at 131-32.

recommending the elimination of the exemption of State and local governments from the coverage of Title VII. *Id.* at 128. The Senate Committee Report expressly relied on this report, and cited its references to forms of discrimination not involving discriminatory purpose:

> The report's findings indicate that the existence of discrimination is perpetuated by both institutional and overt discriminatory practices, and that past discriminatory practices are maintained through *de facto* segregated job ladders, invalid selection techniques, and stereotypical misconceptions by supervisors regarding minority group capabilities. The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector.

S.Rep.No. 92-415 (92nd Cong., 1st Sess.) at 10. The House Committee Report was substantially similar, H. Rep.No. 92-238 (92nd Cong., 1st Sess.) at 17, 1972 *U.S. Code Cong. & Admin. News* 2137, 2152.

Under the standards established by this Court since the passage of the Civil War Amendments, the exten-

sion of Title VII to State and local governments was appropriate legislation under the Enforcement Clause of the Fourteenth Amendment.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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